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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-971

STATE OF NORTH CAROLINA EX REL. SARAH T. MORROW; STATE
 OF NEBRASKA; AMERICAN MEDICAL ASSOCIATION; AND NORTH
 CAROLINA MEDICAL SOCIETY, *Appellants,*

v.

JOSEPH A. CALIFANO, SECRETARY OF THE UNITED STATES DEPARTMENT
 OF HEALTH, EDUCATION AND WELFARE; AMERICAN ASSOCIATION FOR
 COMPREHENSIVE HEALTH PLANNING, INC.; and NATIONAL ASSOCIATION
 OF NEIGHBORHOOD HEALTH CENTERS, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
 THE EASTERN DISTRICT OF NORTH CAROLINA

**APPELLANTS' BRIEF IN OPPOSITION
 TO MOTION TO AFFIRM**

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The Motion of the Secretary of Health, Education and Welfare (hereinafter "Motion") to affirm the decision of the District Court below upholding the constitutionality of the National Health Planning and Resources Development Act of 1974 (42 U.S.C. §300k *et seq.*) demonstrates that plenary review of that decision is essential.* The Secretary apparent-

*The opinion and order of the United States District Court for the Eastern District of North Carolina, as well as the background and procedural posture of this litigation have been set forth in Appellants' Jurisdictional Statement filed on January 6, 1978.

ly does not dispute the fact that this case raises the important question explicitly left open in *National League of Cities v. Usery*, 426 U.S. 833, 852 n.17 (1976): Whether there are any meaningful limits on use of the spending power to interfere with integral operations of state governments. Instead, the Secretary urges the Court to answer that question summarily by affirming a holding that there are no such limits. Appellants respectfully submit that a matter of such significance requires plenary review by this Court.

I. The Health Planning Act Exceeds The Spending Power Of Congress

Contrary to the assertions of Appellee, the Health Planning Act is not simply another "one of many federal statutes that condition the disbursement of federal funds on compliance with federal standards" (Motion, p. 6). The Health Planning Act does *not* merely set forth the conditions a state must meet to qualify for federal funds made available under the Act. Rather, it requires each state to enact Congressionally-mandated legislation or forfeit all federal funds under approximately fifty other health care programs that had been jointly funded by state and federal governments for many years prior to passage of the Health Planning Act.

These programs, listed in Appendix D to Appellants' Jurisdictional Statement, were established over the years by many different Congresses concerned with advancing medical science and meeting the health care needs of the American people. They have been relied upon by the states in constructing state health care systems and have become essential to the functioning of those systems. Yet all benefits under these laws would be lost by the failure of a state to comply with the dictates of the Health Planning Act.

There is no real dispute about the fact that the continuation of these long-standing programs is critical to the health care of the citizens of Appellants State of North Carolina and State of Nebraska. Consequently, these States simply cannot permit such funding to be terminated.* New doctors, dentists, nurses and auxiliary medical personnel will go untrained. Medical research will go unfinished. And thousands of sick people—those suffering from diabetes, chronic alcoholism, mental illness, circulatory problems, venereal disease, sickle cell anemia, and many other afflictions—will go untreated. Thus, no prior exercise of the spending power even begins to approach the Health Planning Act in its coercive effect on the states.

Although Appellee contends that an "unbroken line of precedent" supports the decision below (Motion, p. 7), analysis of Appellee's extensive citations and discussion reveals not one decision of this Court which supports the unprecedented exercise of the spending power found in the Health Planning Act. The statute at issue in *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947) (Motion, p. 7, n.4), §12 of the Hatch Act, provided that if a state or local official whose principal employment was in connection with any federally financed activity took an active part in any political campaign, the state or local agency would lose an amount equal to two years' compensation at the rate such

*On at least two occasions (Motion, pp. 5, 7-8), Appellee suggests that the termination of funds threatened by the Health Planning Act is not coercive because such funds are only a relatively small percentage of the total budget of the Appellant States. The conspicuous flaw in Appellee's argument is that it assumes that the states have substantial excess funds to allocate to the programs whose federal funding is terminated and that state activities other than those related to public health can bear some of the burden of the loss of funds. Both of those assumptions are utterly inconsistent with the fiscal realities of state governments today.

official was receiving at the time of the violation. Of this sanction, like the sanction involved in *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (Motion, p. 7, n.4), it can truly be said that the state could as a practical matter adopt "the 'simple expedient' of not yielding". *Oklahoma v. Civil Service Commission*, *supra*, 330 U.S. at 143. Here, in contrast, the "simple expedient of not yielding" is simply not available. In addition, unlike the Health Planning Act, the Hatch Act did not require the enactment of legislation by a state, the fundamental attribute of state sovereignty, see *Maryland v. EPA*, 530 F.2d 215, 225 (4th Cir. 1975), *cert. granted*, 426 U.S. 904 (1976), *vacated as moot*, 431 U.S. 99 (1977). Indeed, the primary impact of the Hatch Act was on the political activities of individual citizens, and restriction of such individual activity was upheld even when imposed directly on federal employees. *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947).

The other cases cited by Appellee are even less in point. Appellants do not dispute that the "... Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the states shall be disbursed . . ." *King v. Smith*, 392 U.S. 309, 333 n.34 (1968). But the Health Planning Act does far more. It mandates forfeiture of all benefits under approximately fifty pre-existing federal programs unrelated to the Health Planning Act if a state fails to enact legislation which may be offensive to its public policy or violative of its constitution. Thus, it involves not "a scheme of cooperative federalism" endorsed by this Court in *King v. Smith*, *supra*, 392 U.S. at 316, but a "coercive federalism" in which the federal government exercises its overwhelming spending power to force states to yield to the Congressional decree.

More recent decisions of the Court indicate that the Health Planning Act exceeds the spending power of Congress.

In *Fry v. United States*, 421 U.S. 542 (1975), the Court recognized that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 421 U.S. at 547, n.7. This Court has made it clear, and Appellee has therefore conceded (Motion, pp. 11-12), that Congress could not have relied upon the Commerce Clause to force a state to enact legislation. *National League of Cities v. Usery*, *supra*. See also *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). In so doing, the Court was careful explicitly to reserve for resolution in the context of a concrete case or controversy the complex and fundamental question of whether the Constitution imposes any limits on the extent to which Congress may use its spending power to accomplish indirectly a result which it cannot attain directly under the Commerce Clause. 426 U.S. 833, 852 n.17 (1976). But the holding of *National League of Cities* would be rendered meaningless if Congress were permitted to circumvent the limitations on its power under the Commerce Clause by relying on its power to tax or to spend. See Comment, *Toward New Safeguards on Conditional Spending: Implications of National League of Cities v. Usery*, 26 Am. U. L. Rev. 726 (1977). For, as the Court noted in *United States v. Butler*, 297 U.S. 1 (1936):

"If, in lieu of compulsory regulation . . . which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of §8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states." 297 U.S. at 75.

Moreover, the reasoning in *National League of Cities* suggests that it is the effect of Congressional action on state sovereignty, and not the particular clause upon which such action is predicated, which determines the constitutionality

of a statute such as the Health Planning Act. The ultimate question for resolution was whether Congress had abrogated state powers with respect to "'functions essential to separate and independent existence'". 426 U.S. at 845-846, citing *Coyle v. Smith*, 221 U.S. 559, 580 (1911). The Court went on to suggest that the Constitution places limits on this process even when it is purportedly justified under grants of power other than the Commerce Clause:

"This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce." 426 U.S. at 842. [Emphasis added]

II. The Guaranty Clause Prohibits Exercise of the Spending Power in a Manner Which Strips States of Essential Functions of Self-Government.

Appellee asserts (Motion, p. 12) that questions arising under the Guaranty Clause are not justiciable. The apparent basis for this position is that *some* cases have held that *some* such questions are not justiciable. The logical fallacy of Appellee's position has been recognized:

"The nature of the question, therefore, and not the mere invocation of the clause, determines whether a contention is justiciable and the clause judicially enforceable." *Kohler v. Tugwell*, 292 F. Supp. 978, 984-985 (E.D. La. 1968) (Wisdom, J.), *aff'd*, 393 U.S. 531 (1969).

See also *Burger v. Judge*, 364 F. Supp. 504 (D. Mont.), *aff'd*, 414 U.S. 1058 (1973). This Court also has indicated that questions raised under the Guaranty Clause are justiciable when not "political" in nature and where there is not a clear absence of judicially manageable standards. See *Reynolds v. Sims*, 377 U.S. 533, 582 (1964).

Appellants' position on the Guaranty Clause (Jurisdictional Statement, pp. 10-12) is certainly not refuted by Appellee's contention that the Health Planning Act "no more denies any states a republican form of government than does the regulation states already provide or the displacement of state choices compelled by the Supremacy Clause." (Motion, p. 13) [citations omitted]. The same analogy to displacement of state choices under the Supremacy Clause was rejected in *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *cert. granted*, 426 U.S. 904 (1976), *vacated as moot*, 431 U.S. 99 (1977):

"'Federal law often says to the states, 'Don't do any of these things,' leaving outside the scope of its prohibition a wide range of alternative courses of action. But it is illuminating to observe how rarely it says, 'Do *this* thing,' leaving no choice but to go ahead and do it. The *Federalist* papers bear ample witness to the Framers' awareness of the delicacy, and the difficulties of enforcement, of affirmative mandates from a federal government to the governments of the member states.'" 521 F.2d at 841, citing H. Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 515 (1954).

CONCLUSION

In recent years, Congress has demonstrated an increasing propensity to use its spending power to control the activities of state governments. The Health Planning Act, however, represents a radical new use of that power, for in the Act, Congress has tied the continuation of scores of long-standing health care programs to acceptance of unprecedented, coercive interference with state governmental functions.

In *Steward Machine Company v. Davis*, 301 U.S. 548 (1937), the Court recognized that defining the scope of the powers of Congress to tax and to spend is a difficult task:

"We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future." 301 U.S. at 590-591.

Appellants respectfully submit that the time has now come for a "definition more precise" of the spending power.

Respectfully submitted,

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